Draft Additional Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

(submitted by the Swiss delegation)

Preamble

The signatory States of this Protocol,

Desiring to improve the protection of children from the harmful effects of an unlawful removal or retention as defined in the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,

Updating this Convention by taking account of the development of children's rights since its adoption,

Taking into consideration the paramount importance of the best interest of children,

Have resolved to conclude a Protocol to this effect and have agreed on the following provisions:

Chapter One

Scope

Article 1

Scope

This Protocol applies to all cases of international child abduction as defined in the Convention provided both the State in which the child was habitually resident immediately before his / her removal or retention and the State to which it was abducted are parties thereto.

Chapter II

Additional provisions to the Convention

Article 2

Mediation or conciliation procedure

The Central Authority or the judicial or administrative authority of the requested State shall endeavour to set up a mediation or conciliation procedure in order to obtain the voluntary return of the child or an amicable resolution. At the request of the requested State, the requesting State shall assist in setting up mediation.

The authorities shall encourage in an appropriate manner the persons concerned to participate in such an undertaking.

Efforts to obtain the voluntary return of the child or an amicable resolution shall not delay the return of the child.

If an agreement is reached through mediation, the competent authority may approve such an agreement and declare it enforceable.

Article 3

Right to be heard

The Central Authority or the judicial or administrative authority of the requested State shall hear the child in an appropriate manner or arrange for a qualified person to do so, unless this appears inappropriate in view of the child's age or degree of maturity.

As far as possible, the Central Authority shall hear the parties in person.

Article 4

Protection measures

The judicial or administrative authorities of the State in which the child is:

a) shall assist in the implementation of protection measures taken by the competent authorities of the State in which the child was habitually resident immediately before his / her removal or retention;

b) shall take measures for the protection of the child, in particular to secure the rights of access and rights of contact during the proceedings relating to the application for the return of the child;

c) may, before ordering the return and if the child's situation after the return requires special precautions to be taken, ask the authorities of the State to which the child should be returned to take protection measures, especially in securing rights of access and contacts for the person who removed or retained the child and that person's participation in any subsequent proceeding relating to his / her relationship with the child;

d) may, in its decision to return the child, include measures to ensure the protection of the child on its return.

Article 5

Information and mutual assistance

The Central Authority of the State where the child is or the judicial or administrative authority to which the request for the return of the child has been submitted shall notify the competent authorities of the State where the child was habitually resident immediately before its removal or retention of ongoing proceedings and any decision taken.

The authorities of the States concerned shall cooperate in order to ensure direct access to any relevant documents, evidence and expert reports available in one or the other of these States.

Article 6

Duty to protect and inform after the return

The Central Authority of the State to which the child has been returned or any other competent authority of that State shall:

a) notify the Central Authority of the State where the return of the child has been ordered of any decision on the merits of the rights of custody, made subsequently to such return;

b) reply to reasoned requests for information about the particular situation of this child made within a period of one year after the return of the child by the Central Authority or any other public authority of the State where the return has been ordered.

Observation

Following the adoption at international level of the Convention of 20 November 1989 on the Rights of the Child and the increased attention now placed on the greater interest of the child in all matters concerning him or her, it seems advisable to take this opportunity to re-examine the practical application and interpretation of Article 13, paragraph 1 *b)*, of the Convention. This provision should only in exceptional cases permit the return of the child to be refused. Nonetheless, the practical decision-making procedure in these exceptional cases cannot be the same as that which inspired the authors of the Convention in 1980, in particular in situations, now increasingly common, of abductions carried out by the person mainly responsible for the support of the child, normally the mother. Switzerland is fully aware of the delicate nature of this issue, crucial for the smooth running of the Convention. Taking account of the changes that have come about in actual children's abductions since then, it considers, however, that it is worth making a thorough re-examination of this matter.

With this in mind, the significance of Article 13, paragraph 1 *b)*, could be understood to mean that the relationship between the principle of returning the abducted child and the child's interest will be clarified.

This reason for refusal should be understood to mean that the return places the child in an intolerable situation particularly if the placement with the parent making the request or with a third person is clearly not in the interests of the child and that the parent who carried out the abduction cannot return with the child and that it would be unreasonable to expect that of this parent.

This reason for refusal should in particular prevent the return of the child where the parent making the request does not intend that the child will be entrusted to him or her on his / her return but that the parent merely intends to secure his / her right to personal relations with the child or regulate that again in an appropriate manner. Refusal is also dependent on the authorities of the State to which the child was abducted guaranteeing this right of contact and visit in an appropriate manner.

Chapter III

Final clauses

Article 7

Coordination with the Convention

This Protocol does not derogate from the provisions of the Convention.

Article 8

Examination of the practical operation of the Protocol

The Secretary General of the Hague Conference on Private International Law shall periodically convene a Special Commission to review the practical operation of the Convention and the Protocol and to encourage the development of good practices in accordance with the Protocol.

Article 9

Reservations

No reservations may be made to this Protocol.

Article 10

Signature, ratification and accession

This Protocol is open to the signature of the States parties to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction who were Members of the Hague Conference on Private International Law during its 30th session.

Any other State party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction shall be able to accede to the Protocol.

The instruments of ratification, acceptance, approval or accession will be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 11

Regional economic integration organisations

A regional economic integration organisation constituted by sovereign States, having jurisdiction in certain matters laid down in this Protocol and being a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction may also sign, accept and approve this Convention or accede to it. In such a case, the regional economic integration organisation will have the same rights and obligations as a contracting State, insofar as this organisation has competence in the matters laid down in this Protocol.

On the date of signature, acceptance, approval or accession, the regional economic integration organisation shall notify the Depositary State in writing of matters laid down in this Protocol and for which its member States have delegated their powers to this organisation. The regional economic integration organisation shall, without delay, notify the Depositary State in writing of any change occurring in the delegation of powers specified in the notification made in accordance with this paragraph and of any new delegation of powers.

Any reference to the “Contracting State” or “Contracting States” in this Protocol also applies to a regional economic integration organisation if the context requires that this be so.

Article 12

Entry into force

The Protocol enters into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession.

With regard to the States acceding thereto, it enters into force on the first day of the third calendar month following the deposit of the accession instrument.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol

Done at The Hague, on …, in French and English, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands and a certified copy of which shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its … session.